Supreme Court of the United States

October Term, 1978

No. 78-693

JOSEPH M. BANE, SR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

ISAAC SCHULZ
LOUIS RECHER
FORD, WHITNEY, CRUMP & SCHULZ
1500 Williamson Building
Cleveland, Ohio 44114
216/696-3444

JOHN F. CHAMBERS
RIPPLE, CHAMBERS & STEINER
1820 First Federal Building
Detroit, Michigan 48226
313/961-0130

Attorneys for Petitioner,
Joseph M. Bane, Sr.

Of Counsel:
EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, N.C. 27514
919/933-5106

October 23, 1978

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

Supreme Court of the United States

October Term, 1978

No. .....

JOSEPH M. BANE, SR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit

Petitioner, Joseph M. Bane, Sr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 25, 1978.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Appendix, *infra*, p. A1) is unreported. The judgment of the United States District Court, for the Eastern District of Michigan, Southern Division (Appendix, *infra*, p. A9), is reported at 433 F. Supp. 1286.

JURISDICTION

The judgment of the United States Court of Appeals, Sixth Circuit, affirming the judgment of the United States District Court for the Eastern District of Michigan, Southern Division, against petitioner, was entered on August

25, 1978. Mr. Justice Stewart signed an order extending the time for filing the petition for certiorari to and including October 24, 1978, pursuant to Rule 22(2) of the Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a union president can be convicted of the crime of embezzlement of union funds under 29 U.S.C. §501 (c) where he has merely continued to make authorized payments to a union organizer after the organizer has become too ill to perform all his normal duties and where the government has not proved the absence of substantial benefit to the union from keeping the organizer on the payroll.

STATUTORY PROVISION INVOLVED

United States Code, Title 29.

Section 501(c). Embezzlement of Assets; Penalty

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

STATEMENT OF THE CASE

Petitioner, Joseph M. Bane, Sr., was charged in a nine-count indictment by a grand jury as follows: counts

one through seven, for violation of 18 U.S.C. §1341 (mail fraud) in seven different time periods from on or about November 5, 1970, to on or about March 26, 1974; count eight, for conspiracy to violate 18 U.S.C. §1341 and 29 U.S.C. §501(c); and count nine, for violation of 29 U.S.C. §501(c), in which it was charged that petitioner embezzled $37,700.81 from the International Brotherhood of Teamsters (IBT).

A. Hiring of William Hoffa

In 1967, the defendant, Joseph M. Bane, Sr., president of Teamster Local 614, Pontiac, Michigan, contacted the International Brotherhood of Teamsters to secure organizing assistance for the local (R. 368).* This assistance was required because of the inexperience of the local's organizers and business agents (R. 368). The International, by its then president, James R. Hoffa, suggested that Local 614 employ the services of William Hoffa, the brother of James R. Hoffa (R. 368, 369, 377, 378) and that the International fund such employment with a periodic subsidy to the local. Mr. William Hoffa, like his brother, was a long-time union employee having served the union as both a business agent and organizer for some thirty-eight years (R. 251, 270, 367, 378).

B. Subsidy Program

Under the subsidy program the International paid One Thousand Dollars ($1,000) per month to the local to aid the local's organizing efforts; the subsidy was renewable semiannually (R. 7). Twice each year, Bane, by letter addressed to the president of the International, requested a continuation of the subsidy for the next sixth-month

*Reference is to the Appendix in the Court of Appeals below.

period (R. 57-59, 61, 63, 64, 65, 66, 67, 68). After appropriate authorization by the International officials (R. 62, 68, 73, 75, 78, 81, 87, 89, 93, 94), the International issued monthly checks of $1,000 to the local (R. 69, 70) and the funds were then deposited in an account maintained by Local 614 (R. 71, 94). The local used these funds exclusively to pay Mr. Hoffa's monthly salary (R. 369). None of these moneys were ever paid to or for the benefit of Bane.

The International at all times knew that the $1,000 per month subsidy payments were being used by Local 614 to pay William Hoffa's salary (R. 79, 80, 88, 90, 92, 96, 98) and both the original subsidy and each extension thereunder were approved and authorized by the International with this knowledge (R. 57-59, 60, 61, 64, 66, 67, 72, 73, 75, 76, 77, 78, 79, 81, 82, 84, 88, 89, 90, 92, 94, 98, 99, 101, 102 and numerous other citations in the Trial Transcript). The trial court found that such payments were properly authorized and directed the jury accordingly (R. 447, 448).

C. Course of William Hoffa's Employment

From 1967 until his retirement on December 31, 1973 (R. 100), William Hoffa continued in the employ of Local 614 under this subsidy arrangement (R. 88, 90-98). During this period of employment he served as a business agent/organizer (R. 108, 112, 149, 240, 251, 256, 270, 288, 289, 304, 367). The government has not contended nor is there any basis for contention that Hoffa's employment from 1967 to 1970 was invidious in any respect or that the purpose of employing Hoffa was to raid the union treasury. Hoffa fully performed all the duties required of him as a union organizer. However, from 1970 until his death in 1976, William Hoffa's health seriously deteriorated (R. 152, 284, 297, 298, 302, 313, 318, 319, 375). He became afflicted with a number of diseases including gout, edema, cirrhosis, emphysema, diabetes and heart disease (R. 128, 245-246). Again, at no time prior to the onset of these illnesses did the government ever question the propriety of his employment; it was only during the 1970 to 1973 period when his health prevented him from fully performing his duties that his employment became the subject of this embezzlement indictment.

The state of William Hoffa's ill-health during this three-year period was no secret; it was known to various top officials of the International including Frank E. Fitzsimmons, its president (R. 274, 355-357), Murray Miller, former secretary-treasurer (R. 101, 274, 355-357) and Thomas Flynn, former secretary-treasurer and predecessor to Mr. Miller (R. 356); and it was with this knowledge that each of these individuals approved the payments of the subsidy to Local 614 for Hoffa's salary (R. 81, 89). Mr. Hoffa's ever worsening state of health was also known to the executive secretary of the Michigan Teamster Joint Councils of 43 (R. 333-334), to officials of other teamster locals (R. 329), to numerous employees of Local 614 and to outsiders having business with the local (R. 101, 124, 125, 152, 163, 165, 245, 254, 260, 274, 275, 288, 289, 329, 332, 334, 347, 355, 356).

Because of his illnesses, Hoffa was not at all times able to perform his duties, but he did work whenever he was able (R. 129, 375), and he was continuously paid his full salary (R. 83, 105, 112, 370-373). During the three-year period covered by the indictment, he performed numerous organizing, charitable, grievance reconciliation, administration and other general services on behalf of Local 614 (defendant adduced evidence that Hoffa provided organizing leads, R. 104, 151, 154, 268, 357; directly aided

in organizing activities, R. 125, 149, 150, 151, 153; obtained employer health and welfare plan contributions, R. 164; prepared and distributed handbills and posters, R. 154, 165, 316-318; handled employer/employee grievances, R. 240, 241, 252, 253, 263, 280; performed charitable work, R. 244, handled jurisdictional disputes, R. 261; collected union dues, R. 262, 285, 365; verified compliance with union contracts, R. 264; and assisted other business agents and organizers and performed general services for the union, R. 250, 272, 284, 301, 303, 312). He also was frequently present, available for assignment or carrying out his duties at the local headquarters during this period R. 123, 129, 137, 141, 155, 159, 167, 248, 270, 280, 282, 284, 288, 297, 298, 300, 301, 323, 326, 330, 332, 336, 338, 346, 349, 350, 352.

D. Teamster Sick Pay Policy

Although no formal union resolution was ever introduced at trial, unrebutted testimony was given by numerous union officials and employees that it was the union's policy to pay sick employees their full salary during periods of illness (R. 101, 102, 138, 257, 258, 259, 277, 305, 329, 364, 365). This policy was also shown to be the union's actual practice (R. 119, 257, 277, 306, 329, 334, 364, 365). The defendant, in accordance with this policy and practice (R. 83, 96, 105, 106, 112, 370-373), approved regular salary payments to William Hoffa during his periods of illness.

E. Trial and Conviction

At the close of the government's case, the defendant moved for a judgment of acquittal (R. 170). The trial court denied the motion (R. 239) and held that the essential factors to be considered in determining whether Bane had violated the embezzlement statute were (1) whether Bane

had a good faith belief that the funds were being used for union business and (2) whether the union had authorized the expenditures (R. 236) and the court charged the jury accordingly. Appendix, *infra*, A25-26. Whether a benefit actually accrued to the union as a result of employing Hoffa was, in the court's view, not material for a conviction and no charge on that issue was made.

Based on the good faith standard, the jury found petitioner guilty of six of the seven counts of mail fraud and of violating §501(c); petitioner was acquitted of one count of mail fraud and conspiracy. Petitioner moved for a judgment of acquittal after the jury verdict. The district court granted a new trial on the six mail fraud counts but denied the motion as to the §501(c) violation. Appendix, *infra*, p. A27.

Petitioner raised two issues on appeal: first, whether a union official could embezzle funds within the meaning of §501(c) by making validly authorized salary payments to an experienced but incapacitated union employee, when those payments have at least a colorable benefit to the union and do not benefit the union official himself; second, if so, whether the government must demonstrate, as an element of a §501(c) charge, that there resulted no benefit to the union from expenditure of the authorized payment.

The Sixth Circuit Court of Appeals held that §501(c) permits a conviction essentially on two mental elements: (1) fraudulent intent to deprive a union of its funds and (2) lack of a good faith belief that the expenditure was for the legitimate benefit of the union. According to the Court, ". . . it is not necessary for the government to prove that the expenditure did not actually benefit the union. To require such proof could absolve a defendant of liability when an otherwise fraudulent appropriation of funds fortuitously had some beneficial effect upon the

union. Such a requirement would also be inconsistent with the strict fiduciary duty imposed upon union officials by §501." Appendix, *infra*, pp. A6-A7. Petitioner contends that, without such proof, the burden of justifying union expenditures is on the defendant and a jury can convict any union official when it disagrees with his decision to expend funds. This result is particularly egregious in a case such as this because the decision whether to continue to pay an employee who has become sick is inherently managerial and discretionary.

REASONS FOR GRANTING THE WRIT

1. This Case Raises Significant and Unique Questions Concerning the Reach of U.S.C. 29 §501(c)

Unless reviewed by this Court, the decision below will constitute a dangerous and authoritative precedent for applying §501(c) to a situation never contemplated by Congress. By permitting a federal court jury to substitute its judgment for that of a union officer as to whether and when an employee should have been discharged and whether and when the union has received full value for authorized expenditures, the Sixth Circuit has sanctioned a most questionable invasion into the internal affairs of unions. As was said by the Second Circuit in *Gurton v. Arons*, 339 F.2d 371, 375 (2nd Cir. 1964), "the provisions of the Labor Management Reporting and Disclosure Act were not intended by Congress to constitute an invitation to the courts to intervene at will in the internal affairs of unions. . . The internal operations of unions are to be left to the officers chosen by the members to manage those operations except in the very limited instances expressly provided for by the Act."

Expressly abjuring any requirements that the Government prove that an authorized expenditure did not in fact benefit the union, the Sixth Circuit has effectively placed on the defendant the burden of proving the existence of such a benefit. At the same time, the Sixth Circuit has held that the presence or absence of such a benefit is "relevant" to the two statutory elements that the government must prove: (1) that the defendant had a fraudulent intent to deprive the union of its funds, and (2) that the defendant lacked a good faith belief that the expenditure was for the legitimate benefit of the union. What is not explained is how the government can escape any burden of proving what concededly is a "relevant" factor in the government's establishment of the statutory offense described in §501(c).

This novel shift in the burden of proof is exacerbated here by the fact that the authorized expenditure of union funds to employ the organizing services of William Hoffa unquestionably benefitted Local 614 throughout the 1967-1970 period when Hoffa was physically able to perform all of his tasks. Logic and common sense dictate that it should be the burden of the government to prove that such benefit decreased so substantially during the 1970-1974 period, when Hoffa's health became progressively worse, that petitioner must have acquired a new and fraudulent intent to deprive the union of its funds and have lost his previous good faith belief that the expenditure of union funds to pay Hoffa was for the legitimate benefit of the union.

The government's theory was that, when Hoffa became ill in 1970, petitioner should at some time have removed Hoffa from the union payroll, because Hoffa no longer was able to participate in organizing campaigns and no

longer could be considered an organizer for whom petitioner could legitimately request and receive subsidies. In short, the government sought only to prove that in the 1970-1974 period Hoffa had not personally organized any companies. But the government did not attempt to prove the status of Hoffa's health or, more importantly, that Hoffa's continued affiliation with Local 614 was without substantial benefit to that union. Rather, petitioner was put to the burden of explaining to the jury why he decided to continue subsidy payments to Hoffa—i.e., that Local 614 still obtained substantial benefits from Hoffa's affiliation despite his illness. Obviously, the jury disagreed with petitioner's business judgment in this respect.

This case involves nothing more devious or underhanded than continuing to pay a full salary to an employee who has suffered a physical deterioration, a deterioration that rendered him incapable of performing all of his work at all times. Here the government seeks to establish a §501(c) embezzlement out of the unfortunate circumstances of that human deterioration. It seems only fair to insist that the government prove that the resulting decline in services rendered by an employee to the union was so gross, so complete and so obvious so as to reflect upon the good faith and intent of those who continued to make authorized payments to the employee.

One must question whether Congress ever intended to elevate the inefficiencies and inabilities of a seriously ill employee into the crime of embezzlement by the one authorized to pay his salary and one must question whether Congress, in enacting §501(c), ever contemplated that the business judgment of the employer who decides to continue the sick employee on the payroll could be second-

guessed and made the basis for a criminal conviction. Certainly nothing in the language of §501(c) or in the legislative history of the Landrum-Griffin Act looks to any such invasion and criminalization of internal union judgments.

2. The Lower Courts Have Exhibited Confusion and Conflict in Applying U.S.C. 29 §501(c)

Not surprisingly, the application of the standards employed by the Sixth Circuit in affirming the conviction of this case finds no parallel in any other federal court decision. No other court has confronted the problem of applying the §501(c) embezzlement concept where an employee's health status drastically changes. But if one concentrates on the significance of the "union benefit" notion, which the Sixth Circuit said lay within the petitioner's burden of proof, one finds but confusion and conflict among the Circuits.

In *Colella v. United States*, 360 F.2d 792 (1st Cir. 1966), the defendant, an experienced labor organizer employed by the International Union of Electrical, Radio and Machine Workers (IUE) AFL-CIO, was indicted under 29 U.S.C. §501(c) for inflating hotel and car rental bills incurred while pursuing IUE's interests in Puerto Rico during a major strike. The defendant admitted these allegations but asserted that such action was necessary ". . . to recover monies spent for liquor, for payment to picket captains, and for other purposes 'which could not be covered by strike relief.' . . ." *Id.* at 796. The First Circuit Court approved a jury charge that "'. . . in order to warrant the defendant's conviction, the evidence must convince you beyond a reasonable doubt that the defendant submitted his requests for payment with the criminal intent to obtain money which had not been spent for a union

purpose *and* did thereafter use that money for a non-union purpose.'" *Id.* at 804 (emphasis added). Under this standard, the government must prove a lack of union benefit ("non-union purpose") to sustain a §501(c) conviction. The First Circuit Court stated that such would be the case even where the expenditures, as here, are authorized. *Id.* at 804.

Colella still represents the law on this subject in the First Circuit. See, for example, *United States v. Sullivan*, 498 F.2d 146, at 148-149 (1st Cir. 1974). Therefore, where a union official, charged with a §501(c) embezzlement, is found to have acted with a fraudulent intent in making authorized expenditures for a union purpose, the union official's guilt or innocence will turn on whether he is tried in the Sixth Circuit or the First Circuit. In the Sixth Circuit, the defendant in these circumstances will be guilty even though the expenditure benefited the union. In the First Circuit, the defendant will be innocent so long as the funds were used for a union purpose.

The Second Circuit has held that where expenditures are authorized, a good faith *belief* that the funds were being used for union business will exculpate a defendant, *United States v. Santiago*, 528 F.2d 1130, at 1133-1134 (2nd Cir. 1976), but *actual* benefit or lack of benefit to the union is only relevant insofar as it reflects on the presence or absence of other essential §501(c) elements, *United States v. Ottley*, 509 F.2d 667, at 671 (2nd Cir. 1975). The Sixth Circuit agrees with the holding in *Ottley* (Appendix, *infra*, p. A6), as does the Fifth Circuit, *United States v. Nell*, 526 F.2d 1223, note 13 (5th Cir. 1976).

On the other hand, the Second Circuit has stated that where expenditures are *not* authorized and there is not even a good faith belief that they were authorized, "[i]f these [funds] *actually were used for union business* . . . we doubt that Congress intended to hold such expenditure criminal." *Ottley, supra*, note 6 (emphasis added). However, according to the Eighth Circuit, where disbursements are not authorized a showing of union benefit is not even relevant to disprove fraudulent intent to deprive a union of its funds. *United States v. Goad*, 490 F.2d 1158, at 1166 (8th Cir. 1974). *Goad* added, however, that ". . . the issue of union benefit might be material where there *was* proper authorization. . . ." *Id.* at 1163 (emphasis added).

These decisions underscore the confusion which must be resolved by this Court. If proof of a substantial absence of union benefit is not required to sustain a §501(c) conviction, the government and juries, with the benefit of hindsight and relying solely on the element of criminal intent to defraud, will be free to second-guess union officials whose decisions, which may turn out to be wrong or ill-advised, do not amount to a theft of union funds.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

ISAAC SCHULZ
LOUIS RECHER
FORD, WHITNEY, CRUMP & SCHULZ
1500 Williamson Building
Cleveland, Ohio 44114
216/696-3444

JOHN F. CHAMBERS
RIPPLE, CHAMBERS & STEINER
1820 First Federal Building
Detroit, Michigan 48226
313/961-0130

Attorneys for Petitioner,
Joseph M. Bane, Sr.

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, North Carolina 27514
919/933-5106
Of Counsel

APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed August 25, 1978)

No. 77-5333

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH M. BANE, SR.,
Defendant-Appellant.

APPEAL from the United States District Court
for the Eastern District of Michigan,
Southern Division

Before: PHILLIPS, *Chief Circuit Judge*, CELEBREZZE, *Circuit Judge*, and NEESE,* *District Judge.*

CELEBREZZE, *Circuit Judge.* Appellant, Joseph M. Bane, Sr., was found guilty by a jury of misappropriating union funds in violation of 29 U.S.C. § 501(c).[1] The prin-

*The Honorable C. G. Neese, United States District Judge for the Eastern District of Tennessee, sitting by designation.

1. 29 U.S.C. § 501(c):

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

cipal issues raised on appeal require this court to delineate the elements of the crime set forth in § 501(c) and to determine whether the district court's jury instructions properly reflected those elements. For reasons stated below, we affirm.

Appellant was president of Local 614 of the International Brotherhood of Teamsters in Pontiac, Michigan, at all times relevant to this cause.[2] In 1967, appellant requested for Local 614 a subsidy of $1,000 per month from the Teamsters international union. This subsidy was proposed to enable Local 614 to hire an experienced union organizer. James R. Hoffa, then Teamsters international president, approved the subsidy for six months, subject to renewal. Appellant used the subsidy to hire James R. Hoffa's brother, William Hoffa, as an organizer. The subsidy was renewed at appellants' request for subsequent six-month periods through 1974 on the approval of James R. Hoffa and his successor Frank E. Fitzsimmons.

The government demonstrated that during the period covered by the indictment (*viz.*, November 1970 through March 1974) William Hoffa was a "no-show" and did no organizing work for Local 614.[3] He continued to receive the internatonal's subsidy payments from Local 614, however, throughout this period. Appellant regularly submitted forms to the international union showing that the subsidy was used to pay William Hoffa for organizing.

Appellant and William Hoffa were indicted in early 1976 for seven counts of mail fraud, one count of conspiracy and one count charging violation of § 501(c) both as

2. All of the facts contained in this paragraph are undisputed.

3. This was, of course, disputed by appellant but we must view the evidence most favorably to the government. *Glasser v. United States*, 315 U.S. 60, 80 (1942).

principals and aiders and abettors. All counts arose from the same events—William Hoffa's "no-show" job. William Hoffa died of natural causes before trial. Appellant presented two somewhat inconsistent defenses at trial. First, he claimed that William Hoffa had become too ill to work for Local 614 and that during the period covered by the indictment the payments made to William Hoffa were pursuant to an informal union sick pay policy. Second, appellant claimed that William Hoffa actually did work as an organizer for Local 614 during this time. As to the first defense, it was conceded that William Hoffa was ill, which illnesses eventually led to his death, but there was sufficient evidence for the jury to conclude either that he was not too ill to work or that, if too ill to work, the payments were not really made pursuant to any sick pay policy. As to the second defense, there was more than sufficient evidence for the jury to find that William Hoffa did not work as an organizer for Local 614.

The jury found appellant guilty of six of the seven counts of mail fraud and of violating § 501(c); appellant was acquitted of one count of mail fraud and conspiracy. Appellant moved for a judgment of acquittal after the jury verdict. The district court granted a new trial on the six mail fraud counts but denied the motion as to the § 501(c) violation, 433 F. Supp. 1286 (E.D. Mich. 1977), so that only the § 501(c) count is presently before us.

Appellant's principal arguments on appeal are twofold. First, he claims the fact that the payments to William Hoffa were authorized and had at least a "colorable" benefit to the union insulates him from liability under § 501(c). Second, he argues that, even if authorization was not a valid defense, the district court should have instructed the jury that it had to find that there was no actual benefit to

the union from the payments made to William Hoffa. Both of these arguments are without merit.

We have held that in enacting § 501 Congress imposed the broadest possible fiduciary duty upon union officers and employees. *United States v. Vitale,* 489 F.2d 1367, 1368 (6th Cir. 1974), citing *United States v. Silverman,* 430 F.2d 106, 113 (2d Cir.), *modified on other grounds* 439 F.2d 1198 (2d Cir. 1970), *cert. den.* 402 U.S. 953 (1971). *See also United States v. Nell,* 526 F.2d 1223, 1232 (5th Cir. 1976); *United States v. Goad,* 490 F.2d 1158, 1161-62 (8th Cir.), *cert. den.* 417 U.S. 945 (1974). "The language in the statute, 'embezzles, steals, or unlawfully and willfully abstracts or converts . . .,' would seem to cover almost every kind of a taking, whether by larcency, theft, embezzlement or conversion." *United States v. Harmon,* 339 F.2d 354, 357 (6th Cir. 1964), *cert. den.* 380 U.S. 944 (1965). We have upheld a § 501(c) conviction on facts similar to those in the instant case, *United States v. Decker,* 304 F.2d 702 (6th Cir. 1962), and the conduct alleged by the government here clearly comes within the statute's coverage of "Any person who embezzles, . . . or unlawfully and willfully abstracts or converts to . . . the use of another, any of the moneys [or] funds . . . of a labor organization of which he is an officer. . . ." Section 501(c) was meant "to protect general union memberships from the corruption, however novel, of union officials and employees." *United States v. Sullivan,* 498 F.2d 146, 150 (1st Cir.), *cert. den.* 419 U.S. 993 (1974), *citing United States v. Harmon, supra,* 339 F.2d at 357-58. Thus, appellant's § 501(c) conviction as either a principal or an aider and abettor must be upheld if the district court properly instructed the jury on the elements of a § 501(c) offense.

Section 501(c) cases are usually one of two types—one type involves unauthorized expenditures of union

funds[4] and the other involves authorized expenditures.[5] This circuit has never had occasion to expressly delineate the elements of a § 501(c) offense in a case involving unauthorized expenditure of union funds.[6] *See United States v. Nell, supra,* 526 F.2d at 1232; *United States v. Goad, supra,* 490 F.2d at 1166. *See also United States v. Robinson,* 512 F.2d 491 (2d Cir.), *cert. den.* 423 U.S. 853 (1975); *United States v. Silverman, supra,* 430 F.2d at 113-17 (Moore, *J.*, dissenting in part). Nor do we have occasion to do so here since the district court instructed the jury that the payments to William Hoffa were authorized by both the international and local union.[7] We thus assume that the expenditures were authorized and analyze the case on that basis.

---

4. This opinion will use "expenditure" to include all types of (mis)appropriations of union funds, with "funds" being used to include "moneys, funds, securities, property, or other assets."

5. *Cf. United States v. Boyle,* 482 F.2d 755, 764 (D.C. Cir.), *cert. den.* 414 U.S. 1076 (1973), in which the court upheld a § 501(c) conviction because the ultimate use of the union funds was illegal irrespective of any issue concerning authorization.

See generally Annot., 15 A.L.R.3d 939, § 10.

6. *United States v. Harmon,* 339 F.2d 354 (6th Cir. 1964), and *United States v. Decker,* 304 F.2d 702 (6th Cir. 1962), both involved unauthorized expenditures of union funds but neither case required the court to spell out the § 501(c) elements in that context. Instead, the court only answered the defendants' contentions that the evidence was insufficient to support the convictions.

7. We agree with the government that the district court could have properly instructed the jury that a guilty verdict was warranted if the funds were not being expended as authorized, even though an expenditure was authorized. The failure to so instruct, however, worked in appellant's favor since it removed from the jury's consideration one possible theory supporting guilt.

The simple fact that authorization was not an issue in this case demonstrates the flaw in appellant's argument that authorization constitutes a complete defense to a § 501(c) charge. As given to the jury, authorization or lack thereof was totally irrelevant since authorization was taken as assumed.

In a § 501(c) case in which the expenditure of union funds was authorized the government must prove two distinct but interrelated elements.[8] First, it must prove that the defendant had a fraudulent intent to deprive the union of its funds and, second, that the defendant lacked a good faith belief that the expenditure was for the legitimate benefit of the union.[9] *United States v. Santiago, supra,* 528 F.2d at 1133-34; *United States v. Ottley, supra,* 509 F.2d at 671-72; *United States v. Dibrizzi,* 393 F.2d 642, 644-45 (2d Cir. 1968); *Colella v. United States,* 360 F.2d 792, 798 (1st Cir.), *cert. den.* 385 U.S. 829 (1966); *Doyle v. United States,* 318 F.2d 419, 422 (8th Cir. 1963).

Whether or not the expenditure did, in fact, legitimately benefit the union is relevant both to the defendant's good faith belief therein and his fraudulent intent. *Ottley, supra,* 509 F.2d at 671. An actual union benefit would tend to make good faith belief therein more likely and fraudulent intent less likely, and vice versa. But, contrary to appellant's argument, it is not necessary for the government to prove that the expenditure did not actually benefit the union.[10] To require such proof could absolve a defendant

---

8. The same rules would apparently apply if the defendant had a good faith belief that the expenditure was authorized, *Goad, supra,* 490 F.2d at 1166, or that the union would authorize it, *United States v. Santiago,* 528 F.2d 1130, 1133-34 (2d Cir.), *cert. den.* 425 U.S. 972 (1976), and *United States v. Ottley,* 509 F.2d 667, 671 (2d Cir. 1975).

9. The government must, of course, prove in every § 501(c) case that it involves "[1] the moneys, funds, securities, property, or other assets [2] of a labor organization [3] of which [the defendant] is an officer, or by which he is employed." These elements were stipulated in this case.

10. *United States v. Vitale, supra,* 489 F.2d at 1369, did not hold that the government must prove an actual absence of benefit to the union in a § 501(c) case involving an authorized expenditure. While the court did note language which could be so read, that passage was a quotation from the portion of Judge Moore's opinion in *Silverman, supra,* 430 F.2d at 113-17, which was a

(*Continued on following page*)

of liability when an otherwise fraudulent appropriation of funds fortuitously had some beneficial effect upon the union. Such a requirement would also be inconsistent with the strict fiduciary duty imposed upon union officials by § 501.

We have examined the district court's jury instructions[11] in light of the above legal standards. We believe

---

Footnote continued—

dissenting opinion; the second circuit's views have been more precisely set forth in *Santiago* and *Ottley.* The holding in *Vitale* was simply that there was sufficient evidence to support the guilty verdict. There was no conceivable benefit to the union from the misappropriation of funds involved there and the court had no need to address the issue of benefit to the union or good faith belief therein.

It should be noted that both appellant's brief and reply brief filed in this court pretermit any mention of *Vitale* and the only other opinions of this court interpreting § 501(c), *Harmon, supra,* and *Decker, supra.*

11. The district court instructed the jury, in part, as follows:

To determine whether these funds of the Union which were paid to William Hoffa were embezzled, you must ask yourselves if the Defendant had a good faith belief that the Union funds which were paid to William Hoffa were being used for the benefit of the Union. Thus, the Government must prove beyond a reasonable doubt that the Defendant did not have a good faith belief that the Union funds which were paid to William Hoffa were for the benefit of the Union. If you are not convinced beyond a reasonable doubt that the Defendant did not have a good faith belief that the funds paid to William Hoffa were for the benefit of the Union, an embezzlement would not have occurred within the meaning of the law.

On the other hand, if you are convinced beyond a reasonable doubt that the Defendant did not have a good faith belief that the funds paid to William Hoffa were for the benefit of the Union, that the Defendant acted knowingly and wilfully, then an embezzlement would have occurred within the meaning of the law.

I would now like to define for you what I mean by a good faith belief. A good faith belief, as commonly used, means a belief or state of mind denoting honesty of purpose, freedom from intention to defraud. Generally speaking, it means being faithful to one's duty or obligation.

(*Continued on following page*)

that the instructions properly focused the jury's attention on the need for the government to prove that appellant did not have a good faith belief that the subsidy payments to William Hoffa were for the legitimate benefit of the union. The instructions, taken as a whole, also gave the jury adequate opportunity to consider actual benefit to the union from this expenditure insofar as that related to appellant's good faith belief therein and his concomitant fraudulent intent.

All of the other issues raised by appellant have been considered and found to be without merit.

The judgment of the district court is affirmed.

Footnote continued—

> I also want to define the term "Union benefit" or "Benefit to the Union." A benefit to the Union is something that furthers the interests of the members and the institution of a labor union. A benefit to the Union occurs when some legitimate purpose of the Union is advanced. A benefit to the Union does not occur if the benefit that occurred only inured to an individual. With regard to expenditures that are or are not Union benefits, some expenditures are clearly in furtherance of the interests of the Union. While others are so clearly not in the furtherance of the Union purpose that such a claim is scarcely credible. Others may depend on the facts of a particular case.
>
> In determining whether there was or was not a Union benefit in this case, you should examine the purposes and results of the payments and use your best judgment to decide if there reasonably was any gain for the members of Local 614 or for the International Brotherhood of Teamsters in the subsidy payments made to Willam Hoffa as alleged.

The district court's instructions on fraudulent intent were found elsewhere in the charge and are not objected to on appeal.

We note that the district court focused on the word "embezzlement" and omitted mention of the other statutory terms, "abstracts" and "converts." The latter terms were probably more appropriate on the facts of this case but we can see no prejudice to appellant from their omission.

We do not mean to suggest that the above quoted jury instructions should be used as a model in future trials since further refinement would be appropriate in light of this opinion. We merely uphold the quoted instructions as adequate on the facts of this case.

OPINION OF THE UNITED STATES DISTRICT COURT

(Dated June 21, 1977)

Criminal Action: 6-80372

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH M. BANE, SR.,
Defendant.

OPINION

Joseph M. Bane, Sr. was charged in a nine count indictment by a grand jury as follows: counts one through seven for violations of 18 U.S.C. §1341 (mail fraud) in seven different time periods from on or about November 5, 1970 to on or about March 26, 1974;[1] count eight for conspiracy to violate 18 U.S.C. §1341 and 29 U.S.C. §501 (c),

---

1. Count one covers the period November 5, 1970 to May 13, 1971; count two covers May 13, 1971 to September 20, 1971; count three covers from September 20, 1971 to May 4, 1972; count four covers May 4, 1972 to December 5, 1972; count five covers December 5, 1972 to July 6, 1973; count six covers July 6, 1973 to February 12, 1974; count seven covers February 12, 1974 to March 26, 1974.

and count nine for violation of 29 U.S.C. §501 (c) in which it was charged that he embezzled $37,700.81 from the International Brotherhood of Teamsters (IBT).[2]

William H. Hoffa, once a co-defendant in this case, died prior to the commencement of trial. William H. Hoffa's brother, James R. Hoffa, had at one time been the President of the International Brotherhood of Teamsters. Joseph M. Bane, Sr. is the President of Local 614 of that Union.

Trial took place before a jury. In essence, the government's theory was that William H. Hoffa, being the brother of James R. Hoffa, was fitted into a "no show" job as a "union organizer" for Local 614. This arrangement was facilitated by several periodic letters[3] in which Bane represented to the International Union that Hoffa was working as an organizer when, in fact, he was not. Hoffa's salary as an organizer was paid under this arrangement as a special "subsidy" by the International Union.

The government's proof showed that beginning in 1967 and periodically thereafter an organizing subsidy was sought from the International Union. In various letters to IBT Bane stated that this subsidy was needed to permit Local 614 to hire an experienced organizer to help out with the organizing of employees of a large list of potential companies. In reliance on these letters the International Union duly authorized the subsidy.

---

2. Count nine also charges aiding and abetting in the violation of 501(c). Title 18, U.S.C., §2 provides that one who aids and abets another in the commission of a crime shall be punished as a principal. Accordingly, the convictions as both a principal and of aiding and abetting in this case merge into one conviction as a principal.

3. For the purposes of establishing the offense of mail fraud, the use of the U.S. mails was clearly shown, and is not in issue.

The government offered no proof that William H. Hoffa was not in fact doing some organizing work in the period from 1967 (at the inception of the subsidy) to 1969 (just prior to the period covered by the indictment). The government's theory was that some time prior to the periods covered by counts one through seven of the indictment, a change occurred. Thereafter, from 1970 to 1974, William H. Hoffa, by arrangement, stopped doing any work, but the requests by Bane for the subsidy, and the payments (now allegedly unlawful) to William H. Hoffa continued. This was the claimed embezzlement.

Bane presented a two-pronged defense: first, that William H. Hoffa did in fact work as an organizer, and that no embezzlement could have occurred; and in second, that William H. Hoffa was too ill to work and the subsidy was in fact used as a 'sick pay' arrangement which, he argues, was a well-established union practice. While it is possible for these two seemingly inconsistent defenses to be consistent (*i.e.*, William H. Hoffa did work for part of the period, but was too sick for the rest of the period), the proof presented did not so indicate. The testimony, even of the same witnesses as to these aspects, often suggested *both* that William H. Hoffa was too ill to work and that he was working at the same time.[4]

---

4. A typical example is the testimony of William H. Hoffa's son, called as a witness for the defense, who testified as follows:

"Q. Do you know a man by the name of William Hoffa?

A. Yes, sir, he was my father.

Q. And we're going to start with the years 1970 to December 31st of 1973.

A. Okay.

Q. Did you know at that time that your father became ill and became progressively more ill during those years?

A. Definitely.

(*Continued on following page*)

The government offered substantial testimony tending to show that William H. Hoffa did not work at all. It offered no direct testimony that William H. Hoffa was not in fact being paid 'sick pay' or that he was healthy.

At the close of proofs Bane moved for a directed verdict of acquittal claiming that the government had failed to show a lack of union benefit from the use of the subsidy funds. Although there was a conflict in the evidence as to whether William H. Hoffa did work, Bane argues that the testimony that William H. Hoffa was too ill to work was uncontradicted, and thus the use of the subsidy as a union benefit, *i.e.*, paying a long-time employee 'sick pay', was incontrovertibly established. Accordingly, Bane argues the government failed to present any proof as to one of the claimed essential elements under

---

Footnote continued—

Q. And did you know by whom he was employed, during those years?

A. Teamsters Union Local 614.

Q. And do you know how long at that particular point, say 1970, your father had been employed by the Teamsters?

A. At that point—you want me to say how long he had been employed by that union?

Q. Yes, from before 1970 down when he started with the union.

A. Oh, he been with the union 35, 50 years, at least. I wouldn't know the exact dates.

Q. And during the years of 1970, Fall and December 31st of 1973, did you have an occasion to visit your father at the union hall?

A. Oh, yes.

Q. How often?

A. I would say on an average no less than two times a month.

Q. Okay. And what was he doing when you visited him at that hall?

A. Behind his desk making phone calls or seeing people who were in the union, under his supervision."

29 U.S.C. §501 (c), and that if there was no embezzlement there was no mail fraud or conspiracy. That motion was taken under advisement and the case was submitted to the jury.

The jury found Bane guilty of the first six of the seven counts of mail fraud, and of embezzlement of union funds. They acquitted him of one count of mail fraud (count seven) and the conspiracy charge in count eight. Bane then renewed his motion adding a motion for judgment of acquittal notwithstanding the verdict.

Both motions essentially require a similar task. The Court must view the evidence in a light most favorable to the government, and inquire if such evidence can support a verdict of guilty.[5] *United States v. Garnes*, 353

---

5. See also *Colella v. United States*, 360 F.2d 792 (1st Cir.), *cert. denied*, 385 U.S. 829 (1966), where at 802-3, the court stated:

As to the latter motion, made at the conclusion of all the evidence, defendant asserts that there was insufficient evidence to justify a finding by the jury of criminal intent and conversion to defendant's use. Our standard of review is that of determining whether the evidence viewed most favorably to the government and all reasonable inferences therefrom support the jury's verdict. United States v. Quagliato, 7 Cir., 1965, 343 F.2d 533, cert. denied, 381 U.S. 938, 85 S.Ct. 1771, 14 L.Ed.2d 702; Genstil v. United States, 1 Cir., 1964, 326 F.2d 243, cert. denied, 377 U.S. 916, 84 S.Ct. 1179, 12 L.Ed.2d 185.

Using this standard, we cannot say the jury was irrational in its finding of guilt. The knowledge of the falsity of expense vouchers was admitted. Despite the parade of defendant's witnesses attesting to the practice of falsity, the jury had heard the President, Secretary-Treasurer, and Comptroller of the union testify to their ignorance of such a practice and the lack of authority. While defendant and a number of other witnesses testified to defendant's having spent money liberally for lunches, drinks, prescriptions, travel, and other union purposes, the jury could have disbelieved all. Or, believing much of this testimony, it could have believed there was a balance unaccounted for and willfully and wrongfully converted to defendant's own use. The jury might well have

(*Continued on following page*)

F.2d 276 (6th Cir. 1965); *United States v. Callan*, 426 F.2d 939, 942 (6th Cir. 1970). In addition, the motion for judgment of acquittal notwithstanding the verdict requires the Court to reexamine the instructions upon which the case was submitted to the jury.

MAIL FRAUD

A re-examination of the jury instructions requires that the convictions on counts one through six be set aside. In charging the jury, the Court in essence defined mail fraud as any embezzlement in violation of 29 U.S.C. §501 (c) which employs the mails. Early in the charge, the Court stated (emphasis added):

> "Because the matter of the charge of embezzlement is of primary importance in this case and must be found by you *in order to find whether or not the Defendant is guilty or innocent of the remaining counts,* I will charge you first on that count . . ."

Similary, when the Court charged specifically on mail fraud, the charge relied heavily on the earlier definition of embezzlement,

---

Footnote continued—

considered that witnesses had testified to a practice of falsity relating chiefly to liquor expense and have felt there was no good reason why defendant failed to obtain and forward receipts for food, travel, and other respectable items making up the largest part of his expenditures. It might have believed the union Secretary-Treasurer that defendant had no authority to bring his family to Puerto Rico. It might have drawn adverse conclusions from the destruction of minutes of a union meeting devoted to charges of falsity, the deposit of some monies in defendant's personal bank account, or even an attempt in defendant's presence to change the testimony of witness Ugarte.

The district court properly allowed the jury to make its own assessment of the evidence.

> "The three factual elements required to be proved by the government beyond a reasonable doubt in order for you to find the Defendant guilty of mail fraud in each of the seven counts referred to are these: first, that the Defendant devised a scheme to [sic] artifice to embezzle union funds and that union funds were embezzled. In this connection, keep in mind my instructions on the law as they apply to Count 9, the count charging alleged embezzlement of union funds. To put it another way, it is necessary for you first to find beyond a reasonable doubt that the crime of embezzlement was committed, and that the Defendant was involved in that crime before you can find that the crime of mail fraud was committed by him . . ."

The elements constituting a 501 (c) embezzlement will be set forth in greater detail in discussing the conviction on count nine. The essence of such a crime, however, unlike fraud, is the breach of a fiduciary duty by a union leader entrusted with union funds in regard to those funds.

Mail fraud, under 18 U.S.C. §1341, requires a "scheme or artifice to defraud," which incorporates the common law elements of fraud.[6] *United States v. Maze*, 468 F.2d 524 (6th Cir. 1972), *aff'd*, 414 U.S. 395 (1973); *United States v. Grow*, 394 F.2d 182 (4th Cir.), *cert. denied*, 393 U.S. 840 (1968); *United States v. Dreer*, 457 F.2d 31 (3rd Cir. 1972); *United States v. Curtis*, 537 F.2d 1091 (5th Cir. 1976); *United States v. Keane*, 522 F.2d 534 (7th Cir.), *cert. denied*, 424 U.S. 976 (1975). Actual, rather than 'constructive' fraud is what is meant for the purposes of criminal prose-

---

6. Except that the fraud need not be successful or completed. This grows out of the language of 501(c) which expressly punishes any "scheme or artifice to defraud"; *United States v. Reid*, 533 F.2d 1255 (D.C. Cir. 1976).

cution under the mail fraud statute. *Post v. United States,* 407 F.2d 319 (D.C. Cir.), *cert. denied,* 393 U.S. 1092 (1968); *United States* v. *Mandel,* 415 F. Supp. 997 (D. Md. 1976).

The test for embezzlement, which focuses on the Defendant's good faith in disbursing union funds falls short of requiring the specific intent to defraud at the time of mailing which must be shown to establish mail fraud. A "scheme to defraud" connotes planning in advance; *United States v. Nance,* 502 F.2d 615 (8th Cir.), *cert. denied,* 420 U.S. 926 (1974), and involves a planned misrepresentation of a material fact in existence at the time of the mailing of the statement. A scheme to defraud must involve a statement which is calculated to deceive; *United States v. Beitscher* 467 F.2d 269 (10th Cir. 1972).

That the jury may have found, when focusing on the embezzlement instructions, that Bane acted in bad faith in disbursing the union subsidy from the International Union does not necessarily mean that they would find that at the time he was requesting the subsidy he intended to disburse the funds in bad faith when those funds were received.

The Court's charge did include a later instruction on the elements of fraud. However, the earlier misleading charge was not sufficiently cured by such a brief correct instruction so as to insure that the jury, in rendering its verdict of guilty, was applying the correct legal standard for mail fraud. Jury instructions are to be judged as a whole. *Cupp v. Naughten,* 414 U.S. 141 (1973); *United States v. Mattucci,* 502 F.2d 883, 888-9 (6th Cir. 1974). In order for instructions not to mislead a jury they should be consistent and harmonious; *Smith v. United States,* 230 F.2d 935, 939 (6th Cir. 1956). ["The fact that one instruction is correct does not cure the error in giving another

inconsistent with it."]. See also *United States v. Reid,* 517 F.2d 953, 965; *Berrier v. Egeler,* ..... F. Supp. ..... (E.D. Mich. 1976).

This is not to say that the Court should direct a verdict of acquittal on these counts. There was evidence that the International Union was knowingly and willfully misled by Defendant Bane into paying an "organizing subsidy" for Hoffa who was not to do any organizing work. The jury's guilty verdict in part was the application of the wrong legal standard and therefore this part of the verdict must be set aside in favor of a new trial.

EMBEZZLEMENT OF UNION FUNDS

The crucial portion of the defense motion, however, pertains to the of [sic] conviction of embezzlement contained in count nine. The elements of a violation of 29 U.S.C. §501 (c) vary somewhat with the facts of each case to which the law is to be applied. First, where it is clear that an expenditure of union funds is authorized and these funds are in fact used for the legitimate benefit of the union, there can be no violation of the law. *United States v. Silverman,* 430 F.2d 106, *modified on other grounds,* 439 F.2d 1198 (2d Cir.), *cert. denied,* 402 U.S. 953 (1970); *United States v. Dibrizzi,* 393 F.2d 642 (2d Cir. 1968); *United States v. Colella,* 360 F.2d 792 (1st Cir.), *cert. denied,* 385 U.S. 829 (1966); *United States v. Goad,* 490 F.2d 1158 (8th Cir.), *cert. denied,* 417 U.S. 945 (1974).

Bane argues that these two propositions are undisputed here. Since the government admits that the subsidy was authorized, Bane argues that because the government failed to submit testimony that William H. Hoffa was healthy, it failed to place in issue the question of the use of the funds for a legitimate union benefit, for Bane says,

it was the undisputed policy of the Teamsters to pay such 'sick pay' to their own employees who were unable to work.[7]

However, the policy of paying such sick pay by the Teamsters, as testified to at trial, was by no means an absolute or assumed practice, and thus uncontroverted in its applicability to William H. Hoffa. It was spoken of as somewhat of an uncertain, although probable, thing. For example Walter Sacharczyk, a man who had been the President of Teamsters Local 334 for some sixteen years and had been with the Teamsters for forty-four years, and would certainly be expected to know of such a policy, cautiously testified in response to questions by defense counsel,

> "A. . . . Marshall was sick for a long period of time and he was paid.
>
> Q. Would you say it was a policy then?
>
> A. Well, if you get sick, you got nothing else to draw your money from, it would be more or less like an obligation on the local for whom you were working that if you are off sick for a short period of time, whatever period of time they maintain you on the payroll."

Similarly, inconclusive testimony also came from George C. Sholp, a man who had been with the Teamsters for many years, and had been an executive board member of his own Teamster local:

---

7. As defense counsel stated in his opening statement,

"We will show that it was union policy when somebody was ill to keep them on payroll even if Mr. Hoffa did nothing and that the union can't treat its members any worse than it wants the employer that signs contracts with them to treat their employees; to treat the person whose [sic] worked for 35 or 38 years like he was garbage when they come ill."

> "A. Myself, for one; I had a heart attack in 1961 and I was in Ford Hospital for three weeks. And I worked part-time for about six months and I was paid continuously. Also Mr. Charles Duebeck, Local 337, was off for years. I think, three or four years with cancer. And he was paid at all times. And the custom was, to my knowledge, that I do not know of anybody who was off ill who was not paid when they were off ill, any local union."

The jury was entitled to consider both what these union officials were able to say and what they failed to say, and to consider the tenor and hesitancy of their statements, and to draw inferences therefrom.

In order to obtain a renewal of the subsidy for each six month period, Bane sent the International Union monthly reports and a renewal request letter,[8] all of which

---

8. One such letter (Government Exhibit #12) was read into the record:

"February 12, 1974

"Attention: Mr. Frank E. Fitzsimmons

"General President

"Dear Sir and Brother:

"At this time we are requesting an extension of another six months on the organizing subsidy from the International Brotherhood of Teamsters in the amount of $1,000 per month.

"Your consideration in granting this extension will be greatly appreciated.

"Fraternally yours,

"TEAMSTERS UNION LOCAL NO. 614

"Joseph M. Bane

"President"

Q. Sir, there is certain handwriting that appears in the upper right-hand corner of Government 12. Do you recognize it?

A. Yes, I do.

(*Continued on following page*)

suggested that William H. Hoffa was doing organizing work and, significantly, none of which mentioned that he was ill. Assistant United States Attorney Shulman aptly suggested, in his closing argument, that the jury might infer from Bane's failure to mention Hoffa's illness that 'sick pay' in the form of such a special subsidy might not have been granted by the International Union,

> "Now, the contention of the defense is that if he was ill and didn't work, it was sort of a standard policy of the IBT to pay ill employees. . . .
>
> . . . *if it was the policy of the Teamsters to pay people who are ill, and there is nothing wrong with it, why didn't he just tell him?* They wrote letters every six months renewing the authorization through

---

Footnote continued—

> Q. Would you please read it and identify what is on there and to whom the initials belong?
>
> A. Okay. "Six months, F.E.S. Frank E. Fitzsimmons"

These renewal letters must be considered in the context of the other reports that the International Union required that were testified to,

> Q. In this particular instance then, sir, are you saying that Local 614 had its own account number within the financial record system of the International Brotherhood for the disbursement of and receipt of a subsidy payment?
>
> A. Yes, we could summarize all the disbursements to him.
>
> Q. Now, if you move down to the lower part of the page where there is a listing it says "description" and under that appears "organizing subsidy," is that correct?
>
> A. Yes, sir.
>
> Q. Does that refer back then to the subsidy that was requested in the authorization letter?
>
> A. Yes.

Also, they must be viewed in connection with the original letter requesting the subsidy (Government Exhibit #1) which is attached as an appendix to this opinion.

> the whole period of the indictment. They told them that they needed it for organizing."[9] (emphasis added)

Thus, the jury could have found that, in this case, it was not a matter of established policy of the International Union, whose funds were being used, to pay an employee such as William H. Hoffa sick benefits in the event that he became too ill to do the special organizing work for which he was being subsidized.

In the alternative, if the jury accepted this as a legitimate union policy, and therefore accorded any 'sick pay' paid to William H. Hoffa the status of a union benefit as that term was defined for them by the Court, there was still a question for the jury as to whether William H. Hoffa was too ill to work throughout the entire period covered by the indictment. The government offered considerable testimony and documentary evidence tending to show that during the entire period of the indictment William H. Hoffa did no organizing work. The only two times when William H. Hoffa was seen at the union hall or in another union context, which are undisputed were, (1) when he came in to pick up his paychecks, and (2) when he helped settle a dispute with an employer on behalf of a teamster union member who happened to have

---

9. And the prosecutor further argued,

> ". . . Now, what we have shown you is a series of documents which show that they did some organizing activity. Now, when the organizing activity was in process, they put that on the form and at the bottom of this document. Now, when they had nothing to report, they put that on the form.
>
> Well, the purpose of this exercise, where you see two of these in a row with nothing to report, is to get a point across.
>
> . . . Now you have got to keep in mind that the lynchpin of this whole thing is why submit these forms to get paid. Why doctor the forms if in fact you don't have to doctor them to get paid?"

been closely related to him,[10] through other long-standing business dealings. This is not to say that there was no evidence that William H. Hoffa did no work. There was some evidence but it may have been disbelieved by the jury.

The fact that the jury convicted Bane of counts one through six, but acquitted him of count seven suggests that they may have considered that only during the time period covered by count seven was William H. Hoffa too ill to work. It is significant in this connection that count seven covered the most recent time period, and the evidence suggested that William H. Hoffa's physical condition became worse as time went on.[11] In addition, Bane's contention that William H. Hoffa was working may have been taken by the jury as an admission that he was not

---

10. With regard to this latter incident, the prosecution argued that it was more of a favor by William H. Hoffa than an official union action,

> "He didn't work with anybody. He didn't organize any companies. He shows up at Price Brothers. We must have had six witnesses on Price Brothers. Who was he out there for a complaint for? Mr. Malowsky. Who is Mr. Malowsky? His renter for 20 odd years. And who else shows up? Mr. Bane and Mr. Walker every day. That's not organizing. That's not his duties, but give him that if you want to. The company was already organized. He was getting paid to organize the unorganized."

11. Even defense counsel, in his closing argument agreed with this.

> "Mind you, those weren't the companies for all three years or for 38 months. Those companies were *just the last months in '73 when the testimony shows Mr. Hoffa was at his sickest time.* Mind you, to be fair, why weren't they for all 41 months." (emphasis added)

It appears that the jury may have accepted this limited defense contention in acquitting in count seven. This further suggests that the jury fully understood that William H. Hoffa's inability to work due to his illness, if true, was not merely a plea for sympathy, but rather a valid business concern of the union.

too ill to work throughout the period of the indictment—even if the jury did not accept that he was in fact working.

Accordingly, there was substantial evidence for the jury to decide that William H. Hoffa was not ill during the periods covered by counts one through six of the indictment,[12] or that it was not a union benefit if he was ill to pay him sick pay.

In *United States v. Ottley*, 509 F.2d 667 (2d Cir. 1975), the Second Circuit took the lead in expanding upon the elements of a 501 (c) violation as set forth in *Silverman, supra,* and other prior cases. Silverman had stated that the existence of a 501 (c) depended upon "whether the contributions were properly authorized and made for the benefit of the union." (430 F.2d, at 113). Judge Moor, dissenting in part, in *Silverman,* noted that the elements of a 501 (c) violation would have to vary under different circumstances. See 430 F.2d, at 113. The Eighth Circuit followed this reasoning in *United States v. Goad,* 490 F.2d 1158 (8th Cir.), *cert. denied,* 417 U.S. 945 (1974), in holding that, in the absence of a valid authorization, a finding that the union would have authorized or ratified the expenditure had they known would acquit the defendant.

In *Ottley,* the Second Circuit dealt with a case where the funds expended for a car were not authorized, and were also not used for the benefit of the union. Ottley, the union president, had approved cars for several other union officials, including one Byrne. The other cars were

---

12. Although the convictions as to counts one through six have been set aside in favor of new trial because the jury was not given a correct legal standard—that of fraud as opposed to embezzlement—the jury's finding may be informative where, as here, embezzlement is at issue. If the jury found that he was able to work and did not during six (or any) of the seven time periods at issue this element of embezzlement would be established.

used to go to and from union meetings, etc., and so led to some union benefit. Byrne, however, could not drive and so he gave the car to his wife for her personal use, and took taxis (which he also charged to the union as an expense). Ottley, who had approved the car for Byrne, was prepared on appeal to accept that the car was not used for union benefit, but argued that he did not know that Byrne couldn't drive and assumed the car had been properly used. The Second Circuit, having in mind the purpose of 501 (c) to create a fiduciary duty on the part of union officials, acknowledged that on those facts the crucial element for the government to show was Ottley's lack of a good faith belief that there was a union benefit. The opinion in *Ottley* did not set aside the elements as stated in *Silverman* on *Silverman's* facts. See also *United States v. Santiago*, 528 F.2d 1130 (2d Cir. 1976).

What emerges from this complex judicial experience is a crime whose elements, at least for the purposes of judicial definition, vary in each case. Four possible fact questions may (but need not) arise:

(1) Whether the expenditure of union funds is duly authorized;

(2) Whether the union, if it knew of the expenditure would so authorize;

(3) Whether the expenditure of union funds is made for the benefit of the union; and

(4) Whether the officer, in making the expenditure, had a good faith belief that the funds were being used for the benefit of the union.

If the funds are clearly authorized and clearly for the benefit of the union, there can be no violation of 501 (c), as indicated earlier; see also *Silverman, supra.*

If, however, assuming the funds to be duly authorized, the expenditure was not for the benefit of the union, then the union official's lack of good faith belief in a union benefit, and not the benefit itself, becomes an essential element of the crime; *Ottley, supra.* On the other hand, if an expenditure is instead not authorized, an essential element of the crime becomes whether or not the union, if it had known of the expenditure, would have approved or ratified it. If not, then the duty imposed by 501 (c) has been violated; *Goad, supra.* If the union would have approved the expenditure, then the government still must prove either lack of union benefit or lack of good faith belief in union benefit as required by the tests set forth earlier.

In the present case, the authorization has not been questioned and the jury was so instructed. Whether or not the funds were used for the benefit of the union, however, as well as whether or not Bane had a good faith belief that they were to be used for the benefit of the union were both open to question because of the evidence adduced at trial. Faced with a choice, the Court, without objection by either party, focused the jury's attention on the question as to the defendant's good faith belief that the funds were being used for the benefit of the union.

> "To determine whether these funds of the union which were paid to William Hoffa were embezzled, you must ask yourselves if the defendant had a good faith belief that the union funds which were paid to William Hoffa were being used for the benefit of the union. Thus, the government must prove beyond a reasonable doubt that the defendant did not have a good faith belief that the union funds which were paid to William Hoffa were for the benefit of the

union. If you are not convinced beyond a reasonable doubt that the defendant did not have a good faith belief that the funds paid to William Hoffa were for the benefit of the union, then an embezzlement would not have occurred within the meaning of the law. On the other hand, if you are convinced beyond a reasonable doubt that the defendant did not have a good faith belief that the funds paid to William Hoffa were for the benefit of the union, and that the defendant acted knowingly and willfully, then an embezzlement would have occurred within the meaning of the law.

"I would now like to define for you what I mean by 'good faith belief'. A good faith belief, as commonly used, means a belief or state of mind denoting honesty of purpose; freedom from intention to defraud; generally speaking, it means being faithful to one's duty or obligation."

This test, which began in *Ottley*, and was referred to with approval in *United States v. Santiago*, 528 F.2d 1130 (2d Cir. 1976),[13] serves to protect the defendant. It broadens his defense in a manner that carries out the underlying purpose of 501 (c), which sought to create a duty of candor and trust on the part of the union officials.

---

13. In *Santiago*, as here, there was some doubt as to whether the funds were used for the benefit of the union, and the trial court charged the jury to consider whether or not defendant had a good faith belief that the use of the funds was for the union's benefit (at 1133-4);

The trial judge instructed the jury to measure appellant's conduct by the test we approved in *United States* v. *Ottley*, 509 F.2d 667, 671 (2d Cir. 1975), viz. did appellant have a good-faith belief that the funds were being used for union business and that the union had properly authorized the expenditures or would properly ratify them. Measured by this test, appellant's conduct was found wanting. We see no error.

Accordingly, where there is no doubt as to the employment of funds being for the benefit of the union, the Court may consider the existence or lack of union benefit as the appropriate legal issue.[14] Where, as here, there is a question as to whether the funds were used for personal or union benefit, the appropriate issue becomes not whether there in fact was a benefit to the union, but rather whether the defendant had a good faith belief that the funds were being used for the benefit of the union. Thus, for example, a union official who had placed a sauna in his home with union funds might argue that the union derived a benefit from having healthier officials. However, a jury considering whether he, in good faith, believed this, might still return a guilty verdict. On the other hand, as in *Ottley*, this standard protects the innocent union official without whose knowledge funds are embezzled.

Defendant's motion must be granted in part and denied in part. The convictions on counts one through six of the indictment are set aside for a new trial; the verdicts of not guilty as to counts seven and eight, of course, stand, and the verdict of guilty on count nine must also stand. An appropriate order is entered contemporaneously herewith.

/s/ JOHN FEIKENS
United States District Judge

Date: June 21, 1977,
Detroit, Michigan.

---

14. Note that if funds were not authorized, and the finder of fact concluded that their expenditure would not be ratified by the union membership had they known of the expenditure (as in a case where the union by laws or resolutions prohibit the expenditure) even if the funds were used for the union's benefit, a breach of the duty imposed by 501 (c) would have occurred.

APPENDIX:

Government's Exhibit #1

GENERAL DRIVERS AND HELPERS, LOCAL No. 614
of the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA

1410 S. Telegraph Road
Phones: JOrdan 6-3836
FEderal 4-4573
Pontiac, Michigan

President
Joseph M. Bane

Secretary-Treasurer
Rex F. Liles

February 13, 1967

International Brotherhood of Teamsters
Chauffeurs, Warehousemen & Helpers of America
25 Louisiana Avenue, N. W.
Washington, D. C. 20001

Attention: Mr. James R. Hoffa, General President

Dear Sir and Brother:

Per our telephone conversation of February 7, 1967 in which I requested assistance, it is my understanding this assistance will be in the form of a subsidy from the International Brotherhood of Teamsters in the amount of $1,000.00 per month for a six (6) month period subject to renewal at the end of said six months.

This assistance is needed due to recent excessive organizing expenses. In the last few months we have had several elections conducted by the National Labor Relations

Board such as: Mills Products, Inc., where we merged with the Independent Metal Union of Walled Lake, Michigan, Local 614 was chosen as the bargaining agent for the 250 people employed there. At G & W Engineering an election was conducted by the National Labor Relations Board on February 3, 1967 and the 90 people employed there chose Local 614 as their representative. At American Plastics Local 614 again was chosen as representative for the 200 employees. We are in the process of negotiating agreements for these companies.

The following is a list of companies we are currently working on.

Terry Machine Co., Drayton Plains, Michigan
Interstate Manufacturing, Romeo, Michigan
Morgan Electric, Southfield, Michigan
Searay, Oxford, Michigan
Manufacturing Products, Troy, Michigan
Briney Manufacturing, Pontiac, Michigan
Gilbert Shoes, Pontiac, Michigan
Ford Tractor, Romeo, Michigan
Grimaldi Car Sales, Pontiac, Michigan
Stahl Company, Plymouth, Michigan

We are also in need of an experienced organizer who has had some background in this field. As you know, my business agents and organizers are fairly new.

Any assistance you can render will be appreciated.

Fraternally yours,

Teamsters' Local Union No. 614
/s/ JOSEPH M. BANE
Joseph M. Bane
President

JMB: lb
cc: file

OPINION ON MOTION TO CONSIDER

(Dated July 13, 1977)

Criminal Action: 6-80372

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH M. BANE, SR.,
Defendant.

OPINION

Joseph M. Bane, Sr. moves the Court to reconsider a denial of his earlier motion for judgment of acquittal. He argues that the Court, in its earlier opinion, set forth an incorrect legal standard for upholding his conviction for embezzlement of union funds. He bases his argument on two recent cases which were not brought to the Court's attention at earlier arguments; *United States v. Vitale,* 489 F.2d 1367 (6th Cir. 1974); *United States v. Hart,* 417 F. Supp. 1314 (S.D. Iowa 1976).

While these two cases do, at times, set forth different legal standards in some of their language from that applied by the Court in its earlier opinion in the present case, the cases can readily be reconciled on their facts. Bane points out that *Vitale* states (at 1369):

> "Section 501(c) is read as requiring an intent to deprive the union of the use of its funds and *either* a lack of union benefit from the expenditure *or* a lack of proper authorization for the expenditure." (emphasis in original)

In so saying, however, the Court in *Vitale* was quoting from *United States v. Silverman,* 430 F.2d 106, 114 (2d Cir. 1970), *cert. denied,* 402 U.S. 953, 91 S.Ct. 1619, 29 L.Ed.2d 123 (1971). *Silverman,* referred to in detail in the Court's earlier opinion in the present matter was correct in so stating on its facts. More recent caselaw[1] was considered controlling.

Hart, cited by Bane, does state in so many words that once a union expenditure is authorized no embezzlement can occur. On its facts, since the funds in *Hart* were used for the purpose for which they were authorized, that standard may have been correct. In the present case, however, the government's theory was that Bane received a subsidy authorized for disbursement for union organizing but used, in fact, to be paid to a man who did not work at all. If the *Hart* standard were applied as argued by Bane, any expenditure, once the funds for it were approved—even if that approval was not for the purpose it was actually used for—would be beyond the reach of the law. Insofar as language in the *Hart* opinion suggests otherwise, this Court respectfully differs.

Accordingly, no reason is presented for reconsideration, and Defendant's motion must be denied. An appropriate order is entered contemporaneously herewith.

---

1. *United States v. Goad,* 490 F.2d 1158 (8th Cir.), *cert. denied,* 417 U.S. 945, 94 S.Ct. 3068, 41 L.Ed.2d 665 (1974), for example, was decided contemporaneously to *Vitale,* and *United States v. Ottley,* 509 F.2d 667 (2d Cir. 1975) was decided subsequent to *Vitale. Ottley* is well recognized as a leading case in a trend toward refining the simplistic holding of *Silverman.*